FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 19 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
*Petitioners,*

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.,
*Counsel for the Petitioner.*

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
904 Public Service Building,
Portland 4, Oregon,
*Of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 3 |
| Questions Presented | 3 |
| Constitutional Provisions, Statutes, and Rule of Court Involved | 4 |
| Statement | 4 |
| A. The Original State Proceedings | 4 |
| B. The Federal Prosecution | 6 |
| C. State Court Injunction against State Officers | 9 |
| D. Application to Ninth Circuit for Writ of Prohibition | 9 |
| E. Petitioners' Trial in United States District Court | 10 |
| F. State Contempt Proceedings after Conclusion of Federal Trial; The Federal Injunction | 13 |
| G. The Decision of the Court Below | 14 |
| Reasons for Granting the Writ | 16 |
| Conclusion | 26 |
| Appendix A—Opinion Below | A1 |
| Appendix B—Judgments Below | A14 |
| (1) Original Judgment | A14 |
| (2) Judgment on Petition for Rehearing | A14 |
| Appendix C—Opinion of Court Below Denying Stay to Enable the Filing of a Petition for a Writ of Prohibition | A15 |
| Appendix D—U. S. District Court's Oral Opinion Denying Petitioners' Motion to Suppress | A18 |
| Appendix E—Opinion of Oregon Circuit Court Enjoining State Officers from Testifying Regarding Illegal Search and Seizure | A27 |

Page

Appendix F—Operative Portions of Federal Restraining Order Forbidding Petitioners from Pursuing Contempt Proceeding in State Court against State Officials who Disobeyed State Order ..... A34

Appendix G—Constitutional Provisions, Statutes, and Rule of Court Involved ..... A39

## AUTHORITIES

*Cases:*

*Ableman* v. *Booth*, 21 How. 506 ..... 18
*Amy* v. *The Supervisors*, 11 Wall. 136 ..... 20
*Benanti* v. *United States*, 355 U. S. 96 ..... 23
*Byars* v. *United States*, 273 U. S. 28 ..... 23, 25
*Fischer* v. *American Ins. Co.*, 314 U. S. 549 ..... 19
*Forman* v. *United States*, 259 F. 2d 128, 261 F. 2d 181, 264 F. 2d 955, certiorari granted, 359 U. S. 982 (No. 779, this Term) ..... 26
*Freeman* v. *Howe*, 24 How. 450 ..... 18
*Grunewald* v. *United States*, 353 U. S. 391 ..... 24, 25, 26
*Hanna* v. *United States*, 260 F. 2d 723 ..... 16, 23
*Irvine* v. *California*, 347 U. S. 128 ..... 20
*Jones* v. *United States*, 262 F. 2d 234, certiorari granted, 359 U. S. 988 (No. 931, this Term) ..... 24
*Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 ... 19
*Lion Bonding Co.* v. *Karatz*, 262 U. S. 77 ..... 19
*Loundagin, In re Application of*, 129 Ore. 652, 278 Pac. 950 ..... 6
*Lustig* v. *United States*, 338 U. S. 74 ..... 22, 23
*Mackenzie* v. *Douglas County*, 81 Ore. 442, 159 Pac. 625 18
*McDonald* v. *United States*, 335 U. S. 451 ..... 24
*McNabb* v. *United States*, 318 U. S. 332 ..... 21
*Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871 ..... 22
*Ponzi* v. *Fessenden*, 258 U. S. 254 ..... 19
*Rea* v. *United States*, 350 U. S. 214 ....3, 9, 10, 17, 20, 21, 23
*Riggs* v. *Johnson County*, 6 Wall. 166 ..... 20
*Rios* v. *United States*, 256 F. 2d 173, certiorari granted, 359 U.S. 965 (No. 854, this Term) .....15, 16, 17, 22
*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 ... 24
*Sgro* v. *United States*, 287 U. S. 206 ..... 22, 25
*Shelton* v. *United States*, 169 F. 2d 665, certiorari denied, 335 U. S. 834 ..... 16

Page

*Sims* v. *Greene*, 160 F. 2d 512 ..... 14
*State* v. *Folkes*, 174 Ore. 568, 150 P. 2d 17, certiorari denied, 323 U. S. 779 ..... 21
*State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958, 206 Pac. 290 ..... 21
*State* v. *McDaniel*, 115 Ore. 187, 231 Pac. 965, 237 Pac. 373 ..... 21, 22
*State* v. *Ware*, 79 Ore. 367, 154 Pac. 905 ..... 21
*State ex rel.* v. *Malheur County Court*, 185 Ore. 392, 203 P. 2d 305 ..... 18
*Testa* v. *Katt*, 330 U. S. 386 ..... 18
*Todd* v. *United States*, 158 U. S. 278 ..... 19
*Toucey* v. *New York L. I. Co.*, 314 U. S. 118 ..... 19
*Weeks* v. *United States*, 232 U. S. 383 ..... 20, 21, 23, 24
*Wolf* v. *Colorado*, 338 U. S. 25 ..... 20, 21, 23
*Yamhill County* v. *Foster*, 53 Ore. 124, 99 Pac. 286 .... 18

*Constitutional Provisions:*

*United States Constitution:*

Supremacy Clause (Art. VI, Clause 2) ..... 3, 18, A39
Fourth Amendment ..... 20, 21, 22, 23, 25, A39
Fourteenth Amendment ..... 20

*Oregon Constitution:*

Art. I, Sec. 9 ..... 21, 22, A40

*Statutes:*

*Federal Statutes:*

Act of March 2, 1793, Sec. 5, c. 22, 1 Stat. 334 .... 19
18 U. S. C. § 371 ..... 6
18 U. S. C. § 2235 ..... 25, A40
18 U. S. C. § 3041 ..... 19
28 U. S. C. § 631 ..... 19
28 U. S. C. § 2283 ..... 19
47 U. S. C. § 501 ..... 7, A40
47 U. S. C. § 605 ..... 7, A41

*Oregon Statutes:*

Laws of Oregon, Ch. 675 of 1955 ..... 6
Oregon Revised Statutes
§ 1.060 ..... 5
§ 141.030 ..... 22, A42

| | Page |
|---|---|
| § 141.990 | 22, A42 |
| § 165.535 | 6 |
| § 187.020(3) | 5 |
| § 249.340 | 5 |

*Rules of Court:*

Federal Rules of Civil Procedure:

| | |
|---|---|
| Rule 65(b) | 14 |

Federal Rules of Criminal Procedure:

| | |
|---|---|
| Rule 2 | 16 |
| Rule 26 | 16 |
| Rule 41(c) | 22, 25, A42 |
| Rule 41(e) | 3, 17, 22, 25, A43 |
| Ninth Circuit Rule 18 | 16 |
| Supreme Court Rule 23(1)(c) | 24 |

*Miscellaneous:*

| | |
|---|---|
| 50 A. L. R. 2d 531 | 20 |
| Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 | 18 |
| 7 Moore, *Federal Practice* (2d ed. 1955) ¶ 65.07, pp. 1648-1649 | 14 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

---

No.

---

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
*Petitioners,*

v.

UNITED STATES OF AMERICA

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 27, 1959.

### OPINIONS BELOW

*Ninth Circuit.* The opinion of the court below in this case (Appendix A, *infra*, pp. A1-A13) has not yet been reported.

The opinion of the court below denying petitioners' application for a stay to enable the filing of a petition for a writ of prohibition (Appendix C, *infra*, pp. A15-A17) was not reported.

The opinion of the court below denying the petitioner Clark leave to appeal *in forma pauperis* is reported at 250 F. 2d 145.

*District Court.* The oral opinion of the district court denying petitioners' motion to suppress (2 MS 519-531)[1] is set forth in Appendix D, *infra*, pp. A18-A26; it was not reported.

*State Courts.* The opinion of the Circuit Court of the State of Oregon for Multnomah County, rendered in connection with the injunction forbidding state and county officials from testifying in the United States District Court in the present case is set out in Appendix E, *infra*, pp. A27-A34; it was not reported.

---

[1] The record in the present case consists of exhibits plus 20 typewritten volumes, as follows:

The first volume contains pleadings, motions, and docket entries; it will be referred to simply as "R.," followed by page references.

Two volumes contain the pre-trial proceedings on the motion to suppress and the motion to dismiss; they will be referred to as "MS."

One volume contains the proceedings on the motion for a continuance; it is not involved here, but was referred to below as "MC."

Fifteen volumes contain testimony; they will be referred to as "Tr.," suitably identified by volume and page.

The twentieth volume contains the proceedings in the court below.

There has also been filed the separately certified record of petitioners' application for a stay to enable the filing of a writ of prohibition.

## JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A14) was entered on April 27, 1959. A timely petition for rehearing was denied on May 28, 1959, the day after its filing (Appendix B, *infra*, pp. A14-A15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, after a state court has suppressed evidence that it held to be illegally seized as a matter of state law and has enjoined state and county officials from testifying concerning such evidence, a federal conviction may thereafter be had and affirmed, where the federal court did not undertake any independent examination of the original state seizure but assumed that it was illegal as a matter of state law, and proceeded on the basis of (a) the testimony of the state officers, who were directed by the federal court to testify notwithstanding the state court injunction, and of (b) the suppressed evidence, which was subsequently taken from the constructive custody of the state court under a federal search warrant, on the footing that *Rea* v. *United States*, 350 U. S. 214, involves an application of the Supremacy Clause, rather than a doctrine of reciprocity and of comity between state and federal courts.

2. Whether the evidence used against petitioners in the federal prosecution was obtained in violation of their rights under the Constitution of the United States.

3. Whether, if the evidence was unlawfully obtained, it was admissible in the federal prosecution of petitioners because obtained by state officers without federal participation.

4. Whether, where a motion to suppress evidence under Criminal Rule 41(e) is based on the ground, *inter alia*, of the insufficiency of the affidavit on which the federal

search warrant was issued, and the district court denies the motion on the expressed ground that the validity of that warrant is immaterial, and then cuts off proof as to whether the affidavit made a sufficient showing of probable cause, it is open to the court of appeals to affirm the ruling denying the motion on the ground that the federal search warrant was valid.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE OF COURT INVOLVED

The constitutional provisions, statutes, and rule of court involved are set forth below (Appendix G, *infra*, pp. A39-A43).

## STATEMENT

Since the issues presented in this petition concern only questions relating to search and seizure, there are stated only sufficient facts to place those issues in their setting. And in view of the interrelationship between state and federal proceedings that this case involves, the relevant facts will be adduced in chronological order.

### A. The Original State Proceedings

Petitioner Elkins, who is, admittedly, the employer of the petitioner Clark, made certain disclosures to a Portland, Oregon, newspaper that cast serious doubt on the integrity and faithfulness of the District Attorney for Multnomah County, Oregon, in which the City of Portland is located. Thereafter, late in the afternoon of Thursday, May 17, 1956, the District Attorney in question, one William M. Langley (8 Tr. 1389), executed an affidavit (R. 59-60) for a search warrant directed against the home of the petitioner Clark, alleging the presence there (R. 59) of "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to Exhibit said photographs."

The warrant (Def. Ex. 5, 4 Tr. 591-593) was executed that Thursday night (1 MS 92-94, 100) by the then Sheriff,

one Terry D. Schrunk (1 MS 86),[2] and among the many articles seized, none of them of an obscene or indecent nature (1 MS 97), were five reels of tape recordings in boxes, with which were slips allegedly in the handwriting of the petitioner Clark.[3]

The State courts were closed on the next three days, Friday, Saturday, and Sunday, May 18-20, 1956.[4] On Monday morning, May 21, 1956, petitioners filed, in the State District Court that had issued the search warrant, a motion to suppress evidence and to return or destroy the seized goods (R. 61). After hearing testimony, the State District Court (Mears, J.) granted the motion to suppress, on the ground that the District Attorney's affidavit had not shown probable cause. The order granting the motion, dated May 29, 1956, appears at R. 61-65; it directed that the property now in question (R. 65) "be and the same is hereby ordered impounded in the possession of the Sheriff of Multnomah County, to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher Circuit or Supreme Court before whom the matter may be heard."

Pursuant to this order, the five reels of tape recordings were placed in a safe deposit box in the First State Bank of Milwaukie, Oregon (7 Tr. 1196, 1203; 8 Tr. 1212-1215, 1244-1246).

Prior to the ruling, however, and during the pendency of the motion to suppress, the Grand Jury of Multnomah County, Oregon, on May 22, 1956, indicted petitioners for

---

[2] Schrunk was Mayor of Portland when he testified, and was then under two state court indictments (1 MS 86).

[3] The five reels became Govt. Ex. 1-5, inclusive, in this case, while the slips became Govt. Ex. 1-B, 2-B to 2-G inclusive, 3-B, 4-B and 5-B; see *infra*, p. 11.

[4] Friday, May 18, 1956, was primary election day in Oregon. O.R.S. 249.340. It was in consequence both a legal (O.R.S. 187.020(3)) as well as a judicial (O.R.S. 1.060) holiday.

the offense of intercepting and obtaining telecommunications (R. 53-54, 67-69), in violation of Ch. 675 of the Laws of Oregon, 1955 (now O.R.S. 165.535).[5]

The District Attorney challenged the jurisdiction of the State District Court to order suppression of the evidence once an indictment had been returned (see 7 Tr. 1168-1169, 1175-1176, 1184-1187; 8 Tr. 1296-1297), whereupon the matter was reargued before the State Circuit Court, a court of general criminal jurisdiction (see *In re Application of Loundagin*, 129 Ore. 652, 278 Pac. 950, and authorities there cited). That court, on September 17, 1956, granted the motion to suppress, and directed that the material found and seized at the time of the state search be turned over to the Attorney General of Oregon to be used and disposed of only on order of the Court; the ruling of the State Circuit Court (Lonergan, P. J.) appears at R. 66-70.

### B. The Federal Prosecution

In the meantime, while the tapes in question were in the bank in Milwaukie pursuant to the order of the State District Court, and while petitioners' renewed motion to suppress was under advisement in the State Circuit Court, the tapes were taken from the Milwaukie Bank under a federal search warrant issued by the United States Commissioner upon affidavit of F.B.I. Agent R. E. Sherk (R. 6-9).

The present nine count indictment followed, on February 4, 1957 (R. 10-21).

Count I (R. 10-14) charged a conspiracy (18 U.S.C. § 371) "to intercept wire communications and divulge and publish the existence, contents, substance, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communica-

[5] Following their federal trial, and during the pendency of their appeal to the Ninth Circuit, the state indictment against petitioners was dismissed.

tions," in violation of 47 U.S.C. §§ 501 and 605 (*infra*, pp. A40-A42).

Counts II to IX, inclusive, alleged substantive violations of 47 U.S.C. §§ 501 and 605, each count naming different persons as parties to the allegedly intercepted conversations, and different persons to whom the conversations were allegedly disclosed (R. 15-21).

Thereafter, petitioners moved to suppress evidence, specifying among other items, 5 electronic tape recordings (R. 50)[6] "of which defendants herein are the owners" (R. 46). The motion to suppress set forth five grounds (R. 46-49; see also 1 MS 210-212):

First, that the state search warrant under which the property was originally seized by state officers had been held illegal by the Oregon courts, and that accordingly such property could not be used in the present proceeding.

Second, the federal search warrant was illegal and void "in that it is and was based upon an insufficient affidavit," so that there was not probable cause for its issuance.

Third, the illegality of the original state seizure renders the evidence illegal "regardless of the manner in which the Federal authorities later obtained the same."

Fourth, that the state and county officers made the unlawful search and seizure "solely for the purpose of permitting and encouraging a prosecution in the Federal Courts for the commission of a crime against the United States."

Fifth, that the property seized was in the custody of the Oregon State Courts at the time, and that the United States District Court had no jurisdiction to seize it.

The foregoing motion to suppress was supported by an affidavit and numerous exhibits (R. 52-70) that specified

[6] These were later introduced as Government Exhibits 1 to 5 inclusive; see p. 11, *infra*.

in detail the state and federal proceedings already outlined in the foregoing portions of the Statement.

Four days of hearing on this motion followed, on April 9 to 12, 1957 (1 MS 40-298, 2 MS 303-517). During the course of the hearing, the United States Attorney conceded the illegality of the original seizure for purposes of the federal motion (1 MS 84):

> "MR. LUCKEY: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal."

Immediately after the close of the four day hearing, the trial judge (East, D. J.) delivered an oral opinion denying the motion (2 MS 519-531); see Appendix D, *infra*, pp. A18-A26. In the course of his opinion, the judge said (2 MS 520),

> "The Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal on its face."[7]

---

[7] Judge East had earlier expressed the same view (2 MS 321-323):

> "THE COURT: • • • I have been listening to all of the testimony and I have reached this conclusion: that it does not make any difference in the ultimate end of this matter whether or not the F.B.I. had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal it has to be on some other grounds under the theory of the defendants other than the fact that he held an illegal search warrant.
>
> • • • • • • • • • • •
>
> "I am merely restricting this ruling to this: That in the ultimate consideration of the matter it makes no difference whether Mr. Sherk had in his possession a search warrant issued pursuant to the Federal act or not. His right of possession must

The substance of the ruling denying petitioners' motion to suppress, insofar as now pertinent, was that the illegality of the original state seizure as a matter of state law did not vitiate and taint the evidence forevermore (*infra*, pp. A18-A26).

### C. State Court Injunction Against State Officers

Judge East announced the foregoing ruling on April 12, 1957. On the next day, petitioners brought suit in the Circuit Court of the State of Oregon for Multnomah County, seeking a temporary restraining order to forbid the State District Attorney, the Sheriff of Multnomah County and his deputies, named State Policemen, and "other State or County officials unknown to plaintiffs," from testifying concerning any facts learned in or as a result of the original state search and seizure which two Oregon courts had successively held to be illegal (*supra*, pp. 5-6). Following a hearing, the State Circuit Court issued the restraining order as prayed for (text at 1 Tr. 3-4), and wrote an opinion (Appendix E, *infra*, pp. A27-A34); as the text thereof shows, the court (Redding, J.) relied on the doctrine of *Rea* v. *United States*, 350 U. S. 214. The restraining order then issued has remained in effect ever since.

### D. Application to Ninth Circuit for Writ of Prohibition

When, at the commencement of the federal trial, on April 16, the restraining order just mentioned was shown

---

be based upon some other ground than that of a valid search warrant in his possession. • • •

"MR. CRAWFORD [counsel for petitioners on the motion] • • • I was trying to understand the effect of your Honor's ruling and what it would prevent me from attempting to do.

"THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant."

to the United States District Judge, the latter stated (1 Tr. 5) that "I have reached this firm conclusion that the order just read so far as it attempts to interfere with the process of this Court here before issue is void and is a nullity and of no force and effect."

Accordingly, petitioners applied to the United States Court of Appeals for the Ninth Circuit for a three day stay of the pending trial, to enable them to petition for a writ of prohibition to forbid the United States District Judge from compelling the giving of testimony or the production of evidence by the officials of the County of Multnomah and of the State of Oregon named in the State Circuit Court injunction. This application was presented on April 22, 1957, the trial being suspended on that day; see 1 Tr. 204-210, 230-231; 2 Tr. 233.

The Ninth Circuit denied the application for a stay, on the basis that a writ of prohibition might not be issued, essentially because the Court of Appeals was of the view that the doctrine of *Rea* v. *United States*, 350 U. S. 214, was not one of comity. The Ninth Circuit said that petitioners' "right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence." The *Per Curiam* opinion is set forth in Appendix C, *infra*, pp. A15-A17; it has never been reported, perhaps because, although an opinion in form, it was captioned "Undocketed order."

### E. Petitioners' Trial in United States District Court

As has been indicated, petitioners' trial began on April 16, and it continued, except for the adjournment on April 22 to permit the foregoing application to be presented to the Ninth Circuit, for some four weeks, including Saturday and night sessions.

1. Inasmuch as nothing now turns on the validity of the indictment or the sufficiency (as distinguished from

the legality) of the evidence, it is only necessary to note two items:

First, the five reels of tape recordings which petitioners had sought to have suppressed (R. 46-49, 50) were admitted into evidence over their objections (Govt. Ex. 1, 1 Tr. 101, 194; Govt. Ex. 2, 1 Tr. 113, 227; Govt. Ex. 3, 1 Tr. 120, 249-250; Govt. Ex. 4, 1 Tr. 122, 270; Govt. Ex. 5, 1 Tr. 134, 279; see also, as to all, 12 Tr. 1937).[8]

Second, eight officers of the State of Oregon and of its subdivision Multnomah County, seven of whom had been enjoined by the State Circuit Court, by name, from testifying concerning, *inter alia*, copies or transcripts of the tape recordings illegally seized by state officers on May 17, 1956, and thereafter ordered suppressed by two courts of the State of Oregon, were, notwithstanding the state restraining order, directed by the United States District Judge to testify, over petitioners' objections:

(1) George Minielly, Deputy Sheriff of Multnomah County (4 Tr. 569-570, 573-576, 577).

(2) Terry D. Schrunk, Sheriff of Multnomah County at the time of the illegal seizure (5 Tr. 799-804, 6 Tr. 808).

(3) Oscar D. Howlett, Deputy District Attorney of Multnomah County (7 Tr. 1089-1094).

(4) Howard R. Lonergan, Deputy District Attorney of Multnomah County (7 Tr. 1152-1159).

(5) Claude F. Cross, Lieutenant of the Oregon State Police (7 Tr. 1195, 1198-1199, 1202).

(6) Vayne M. Gurdane, Captain of the Oregon State Police (8 Tr. 1241-1244).

---

[8] Each reel was also accompanied by a package, slips, and the like, which were given sub-numbers; these were likewise admitted; see, in addition to the references cited in the text, 6 Tr. 826. Certain of the slips were photographically enlarged, given exhibit numbers suffixed by Z, and similarly admitted over objection. 7 Tr. 1044-1045, 1052.

(7) William M. Langley, District Attorney of Multnomah County (8 Tr. 1389-1391).

(8) James C. Darby, sergeant of the Oregon State Police (8 Tr. 1265). This witness recognized that he was under the State restraining order, because, although not specifically named therein, he was within the category of "other State and County officials" (8 Tr. 1266). He was similarly directed to testify by the trial judge on the basis of the invalidity of the state order (8 Tr. 1266-1268).

All of these witnesses then testified at length, and although, as indicated above, the sufficiency of the evidence on the counts that went to the jury is not now in issue, petitioners do not understand that it could be or that it is now contended that there would be any case against them if their motion to suppress the five reels of tape recordings had been granted, or if the United States District Judge had not directed the eight officials of the State of Oregon and of Multnomah County to testify in violation of the restraining order issued by the Circuit Court of the State of Oregon for the County of Multnomah.

2. At the close of the prosecution's case, the trial judge dismissed Counts III and IV of the indictment and overt acts 1 and 2 of Count I (R. 105; 15 Tr. 2468). In all other respects, petitioners' motions for acquittal were denied (R. 105, 106).

The remaining counts were submitted to the jury, which on May 11, 1957, found both petitioners guilty on all of them (R. 107-108) after deliberating for three hours and 20 minutes (R. 109).

Motions for a new trial and in arrest of judgment, filed by both petitioners, were denied (R. 110-126, 139). The motion for a new trial urged that the tape recordings, Govt. Ex. 1-5, should have been excluded (¶ VIII, R. 114-115), and that the state officers enjoined by the Oregon

State Courts from testifying should not have been directed to testify (¶ IX, R. 115; ¶ XV, R. 116-117).

3. Petitioner Elkins was sentenced to be imprisoned for ten months and to pay a fine of $1000 on Count I; to be imprisoned for ten months and to pay a fine of $1000 on Count II; to be imprisoned for six months on each of Counts V to IX; the periods of ten months each to run consecutively; the periods of six months each to run concurrently with each other and with the second period of ten months (R. 127-128). Hence, petitioner Elkins' sentence was twenty months' confinement and a total fine of $2000.

Petitioner Clark was sentenced to be imprisoned for four months and to pay a fine of $250 on Count I; to be imprisoned for 60 days and to pay a fine of $250 on Count II; to be imprisoned for 60 days on each of Counts V to IX; the period of four months and the first period of 60 days to run consecutively; the remaining periods of 60 days each to run concurrently with each other and with the first period of 60 days (R. 129-130). Hence, petitioner's Clark's sentence was nearly six months' confinement (four months plus 60 days) and a total fine of $500.

By supplemental judgments, each petitioner was made liable for the Government's taxable costs (R. 140-141).

Each petitioner filed timely notices of appeal as to each judgment (R. 131-138, 142).

### F. State Contempt Proceedings After Conclusion of Federal Trial; the Federal Injunction

Following the close of the evidence, both petitioners moved in the Oregon Circuit Court for Multnomah County for an order adjudging in contempt the seven state officials who by testifying at the federal trial had violated the state court's restraining order in which they were specifi-

cally named. This motion was made returnable on May 24. The United States countered by seeking and obtaining *ex parte* from the United States District Court on May 23 a temporary restraining order forbidding petitioners from proceeding further with the contempt proceedings. Both the complaint of the United States and the findings in the temporary restraining order state that the federal subpoenas were issued subsequent to the state order prohibiting the seven named witnesses from testifying. The operative portions of this federal restraining order are set forth in Appendix F, *infra*, pp. A34-A39.

By its terms, the foregoing order was in force for 10 days. On May 31, it was extended for an additional 10 days, and petitioners were directed to show cause why a preliminary injunction should not issue. On June 10, the temporary restraining order was continued "until October 7, 1957, or, until further application is made by either party prior thereto."[9]

The foregoing proceedings were not a part of the record before the Ninth Circuit whose judgment is now sought to be reviewed. We have lodged with the Clerk a certified copy thereof (and have furnished a similar copy to the Solicitor General), in order that this Court may have before it all of the material pertinent to the resolution of the first question presented by this petition.

### G. The Decision of the Court Below

On appeal, the Ninth Circuit affirmed. Apart from rulings on questions not here in issue, and numerous comments on alleged procedural irregularities on the part of petitioners and their trial counsel, the grounds of decision here material may be summarized as follows:

---

[9] Inasmuch as the order as extended has long since expired by its terms, it is unnecessary now to consider whether such second extension was not authorized by Rule 65(b), F. R. Civ. P.; see *Sims* v. *Greene*, 160 F. 2d 512, 516 (C.A. 3); 7 Moore's *Federal Practice* (2d ed. 1955), ¶ 65.07, pp. 1648-1649.

1. The court below held that the lawfulness of the State search and seizure need not be considered, because the record failed to show Federal participation therein. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized," citing *inter alia* its decision in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), in which certiorari had been granted the week before, 359 U. S. 965 (now No. 854, this Term). See pp. A8-A9, *infra*.

2. The court below considered and rejected petitioners' contention that the federal search and seizure was unlawful, holding that the federal search warrant had been issued in full conformity with federal law. See pp. A9-A11, *infra*.[10]

3. The court below held that there was no merit in petitioners' Specification 12, which challenged the District Court's compelling the testimony of the witnesses enjoined by the Oregon State court. See p. A12, *infra*.[11]

---

[10] In view of such consideration, there is no need to dwell on the grounds on which the court below had earlier said that petitioners had no standing to challenge the federal search and seizure; see note 16, *infra*, p. 24, where those grounds are briefly discussed.

[11] As set forth in petitioners' brief in the C.A. 9, p. 114, this read:

> "Specification of Error No. 12. The Court below erred in compelling Government witnesses Minielly, Schrunk, Howlett, Lonergan, Gross, Gurdane, Darby and Langley to testify in violation of the terms of the State court restraining order."

The Ninth Circuit noted (*infra*, p. A12) that this specification did not, "as required by our Rule 18 [quoted in pertinent part in footnote 8 of the opinion, *infra*, p. A4] quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 and the part of specification 13 which relates to the admission of evidence. However, we have considered them and find no merit in them."

Inasmuch as Specification 12 clearly stated the grounds of petitioners' objection, which went to all of the evidence of the named

A timely petition for rehearing was denied on the day after it was filed (Appendix B, *infra*, pp. A14-A15).

## REASONS FOR GRANTING THE WRIT

Here, as in *Rios* v. *United States*, 256 F. 2d 173 (C.A. 9), certiorari granted, 359 U. S. 965 (No. 854, this Term), there is squarely raised the question whether evidence unlawfully obtained by state officers without federal participation is admissible in a federal prosecution. The Ninth Circuit answered that question in the affirmative in both cases, in *Rios* on the assumption that the illegality of the state seizure had been established (256 F. 2d at 177), here on the view that such illegality was immaterial (*infra*, p. A9). Meanwhile, however, the District of Columbia Circuit in *Hanna* v. *United States*, 260 F. 2d 723, concluded that evidence illegally obtained by state officers was inadmissible in a federal prosecution even where there had not been the slightest federal participation in the original seizure, and disapproved its earlier ruling to the contrary in *Shelton* v. *United States*, 169 F. 2d 665 (D. C. Cir.), certiorari denied, 335 U. S. 834.

Inasmuch as this Court has agreed to review *Rios* while the Government did not seek certiorari in *Hanna*, the present case similarly warrants review, as it raises the *Rios* question, but with two strengthening variations.

---

witnesses on substantive grounds that in no sense involved the rules of evidence (cf. Rule 26, F. R. Crim. P.), literal enforcement of the Ninth Circuit's Rule 18 in those circumstances would have required petitioners to duplicate in their brief some 800 pages of testimony adduced over objections that were clearly expressed and understandingly overruled by the trial judge on numerous occasions. Since, however, the court below did pass on and reject Specification 12, it is not necessary now to inquire whether such literal enforcement would have been improper because in violation of Rule 2, F. R. Crim. P., promulgated by this Court; that Rule requires the Criminal Rules "to provide for the just determination of every criminal proceeding," and directs that they be construed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

First, this case does not involve the complication of whether and to what extent the federal court was free to reexamine the state court's earlier determination of illegality; here the Government conceded the illegality of the original state seizure for purposes of this case (1 MS 84, quoted *supra*, p. 8), and such illegality was thereafter assumed by both courts below.

Second, as the Government itself has recognized, this case is a far stronger one for petitioners because of the presence of the state restraining order. In opposing certiorari in *Rios*, the Solicitor General said (Br. Op., No. 40 Misc. [now No. 854], this Term, p. 10):

> "Petitioner argues that, since this Court in *Rea* v. *United States*, 350 U. S. 214, held that, as a consequence to granting a motion to suppress, a federal court has authority to prevent federal officers from turning over evidence to the state and testifying in a state court, state officers should not be permitted to turn over evidence or testify in a federal court following the granting of a state motion to suppress. The short answer to this contention is that the State of California in this case has not attempted to restrain its officers from turning over evidence to the federal government or from testifying in a federal court. Whether it could do so, in view of the federal supremacy clause, is therefore not an issue presented by this case. * * *"

Here, however, that issue is squarely raised. We submit that its public importance is obvious, and that it was wrongly decided below.

*First.* *Rea* v. *United States*, 350 U. S. 214, held that, where evidence had been suppressed by a United States District Court under Rule 41(e), F. R. Crim. P. (*infra*, p. A43), because seized under an invalid federal search warrant, after which petitioner was charged in a state court on the basis of the suppressed evidence, he was entitled to an order from the United States District Court

enjoining the federal agent who had seized the evidence from transferring it to the state authorities, and from testifying with respect thereto in the state courts.

The present case raises the precisely converse situation: Evidence was suppressed by Oregon courts because seized under an invalid state search warrant. Petitioners were thereafter indicted in the federal court on the basis of the identical suppressed evidence. They obtained an order from the Oregon court forbidding the state and county[12] officials who had seized the property from testifying with respect thereto in the federal court or elsewhere. The federal court then compelled the state and county officials to testify, notwithstanding the state court's restraining order, in reliance on the Supremacy Clause.

That reliance, we submit, was misplaced. The Supremacy Clause comes into play when there is conflict between federal and state law and policy; in every instance of such a conflict, state law and policy must of course yield. E.g., *Testa* v. *Katt*, 330 U. S. 386; *Ableman* v. *Booth*, 21 How. 506. But, absent any conflict between federal and state laws and policies, the problem becomes one of maintaining state harmony consistently with national supremacy, "of preventing interference, friction, and conflict between the federal and state courts." Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930). As that scholarly discussion shows, the Supremacy Clause in no sense requires automatic precedence for the proceedings of federal courts in every instance.

Thus, as a state court cannot assume jurisdiction over property in the custody of a federal court (e.g., *Freeman*

---

[12] Under Oregon law, counties are not independent governmental units, but are merely territorial subdivisions and political agents of the State. See *State ex rel.* v. *Malheur County Court*, 185 Ore. 392, 203 P. 2d 305; *Mackenzie* v. *Douglas County*, 81 Ore. 442, 159 Pac. 625, 1033; *Yamhill County* v. *Foster*, 53 Ore. 124, 99 Pac. 286.

v. *Howe*, 24 How. 450), so, reciprocally, a federal court may not seize property held under order of a state court. E.g., *Fischer* v. *American Ins. Co.*, 314 U. S. 549; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77. The latter rule was, plainly enough, violated here, for when the United States Commissioner, who is an arm of the court (see 28 U.S.C. § 631; 18 U.S.C. § 3041; *Todd* v. *United States*, 158 U. S. 278) issued the federal search warrant (R. 7-9) pursuant to which the five reels were seized, those reels were at the time in the custody of the state courts (R. 65, 67, 70). Even in criminal cases, the doctrine of comity requires that "each system shall be effective and unhindered in its vindication of its laws." *Ponzi* v. *Fessenden*, 258 U. S. 254, 259.

Considerations of comity likewise underlie the statute that since 1793 has denied federal courts the right to stay proceedings in state courts. Section 5 of the Act of March 2, 1793, c. 22, 1 Stat. 334, now 28 U.S.C. § 2283; see *Toucey* v. *New York L. I. Co.*, 314 U. S. 118. True, a federal court can grant a stay to protect federal property, *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, but here the seized articles were never thought to belong to the United States, and indeed petitioners were asserting a personal property interest therein (R. 46; 1 MS 286-287).[13] Yet neither the terms of 28 U.S.C. § 2283 or of

[13] Petitioners' motion to suppress, in this case, was (R. 46) for an "Order directing that certain property *of which the defendants herein are the owners*, a schedule of which is annexed," etc. [Emphasis supplied.] And, at the hearing on the motion to suppress, petitioners' counsel again specifically asserted a proprietary interest in the tapes (1 MS 286-287):

> "THE COURT: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?
> "MR. CRAWFORD: That's right.
> "THE COURT: Taken under the State's warrant. You don't repudiate that, do you?
> "MR. CRAWFORD: No.
> "THE COURT: Yes."

its predecessors, nor the underlying policy of those provisions, barred the federal court in *Rea* v. *United States*, 350 U. S. 214, from enjoining a federal agent from transferring property to state officials or from testifying in a state court.

The order considered in *Rea* did not operate as a stay, nor did it attempt to reach property in state custody; it involved simply an *in personam* restraint by a court of the United States on an officer of the United States. So here; the state restraining order (1 Tr. 3-4) was patterned after *Rea* and was directed against the testimony of state officials in order to redress effectively a violation of state law. That order did not undertake to deal with property in federal custody, nor did it attempt to prevent state officials from complying with prior lawful orders of a federal court (as in *Riggs* v. *Johnson County*, 6 Wall. 166, and *Amy* v. *The Supervisors*, 11 Wall. 136).

That state restraining order, far from being in conflict with any federal policy, actually enforced a basic and fundamental federal policy. For this case turns on the overriding federal principle of the Fourth Amendment with its condemnation of unreasonable searches and seizures, and its implementation through the doctrine that forbids the introduction in evidence of matter unlawfully obtained in violation of its provisions. In respect of that policy, the federal courts have blazed the trail, ever since *Weeks* v. *United States*, 232 U. S. 383, with the result that although the States are still not as rigidly limited by the Fourteenth Amendment in this field as is the United States by the Fourth (see *Wolf* v. *Colorado*, 338 U. S. 25; cf. *Irvine* v. *California*, 347 U. S. 128), it was said in 1949 that there were then 17 States that followed *Weeks* as against the single State which had anticipated the doctrine. See *Wolf* v. *Colorado*, 338 U. S. at 29, 33-38. A more recent compilation, see 50 A.L.R. 2d 531, 536, lists 22 states (including Alaska), together

with Hawaii, as now following *Weeks*, either by statute or decision.

Oregon, *non constat Wolf* v. *Colorado*, 338 U. S. at 34 and 38, has been in the *Weeks* column for some time. See *State* v. *Laundy*, 103 Ore. 443, 494, 204 Pac. 958, 974-975, 206 Pac. 290; *State* v. *McDaniel*, 115 Ore. 187, 199-209, 231 Pac. 965, 969-972, 237 Pac. 373. Those decisions have given to the search and seizure provision of the Oregon Constitution, Art. I, Sec. 9 (*infra*, p. A40) the same sanction that *Weeks* gave the Fourth Amendment to the federal Constitution. Accordingly, the Oregon rulings involved in this case that suppressed the evidence illegally taken from these petitioners (*supra*, pp. 5-6)—the Oregon law in action—correctly reflected the Oregon law in the books.

Thus the Oregon law and policy that both federal courts below brushed aside in this case were consistent with and in furtherance of federal law and policy, as the earlier Oregon law and policy (see *State* v. *Ware*, 79 Ore. 367, 373, 154 Pac. 905, 907) were not.[14]

It follows that the rulings below cannot be rested upon the Supremacy Clause—unless indeed that provision is to be invoked, as it was at the trial, not to establish the national paramountcy of the Constitution, but rather to excise from that instrument the protections and prohibitions of the Fourth Amendment.

*Second.* Even if we should be wrong in urging that the state restraining order—which was, very plainly (see pp. A30-A34, *infra*), issued on the authority of *Rea* v. *United States*, 350 U. S. 214—should have been accorded,

---

[14] *State* v. *Folkes*, 174 Ore. 568, 588-589, 150 P. 2d 17, 25, certiorari denied, 323 U. S. 779, rejected the federal rule of *McNabb* v. *United States*, 318 U. S. 332, with respect to a confession. We do not read that decision as repudiating the *Weeks* rule, and as this record shows, the lower Oregon courts do not so read it either.

because entitled to, comity, it still does not follow that petitioners' conviction can be upheld.

Here, as has been indicated, we do not have the *Rios* complication of a reexamination of the original search and seizure. Therefore it is not necessary in this case to inquire whether the federal court was bound by the original state determination, or whether it was free, on a second and more extended hearing, to arrive at a contrary conclusion. On the present record, the Government conceded for purposes of the case that the original search and seizure was illegal (1 MS 84); both courts below made the same assumption (*infra*, pp. A9, A19-A21); and the grounds on which the state courts so held, the lack of probable cause in the affidavit supporting the search warrant (R. 61, 64, 67), are recognized by the courts of the United States (e.g., *Sgro* v. *United States*, 287 U. S. 206, and cases there cited; cf. Criminal Rules 41(c) and 41(e), *infra*, pp. A42-A43) as well as by the courts of Oregon. *Nally* v. *Richmond*, 105 Ore. 462, 209 Pac. 871; *State* v. *McDaniel*, 115 Ore. 187, 193-194, 231 Pac. 965, 967, 237 Pac. 373. Both the Fourth Amendment to the Constitution of the United States as well as Art. I, Sec. 9, of the Constitution of Oregon forbid, in substantially identical language, the issuance of search warrants except on affidavits that make a showing of probable cause. See also O.R.S. §§ 141.030, 141.990 (*infra*, p. A42). The constitutional norm is therefore the same. It therefore follows that, for purposes of this case, the evidence used against petitioners in the federal prosecution was obtained in violation of their rights under the federal Constitution.

That being so, and since on this record petitioners are bound by the concurrent findings of the court below that there was no federal participation in the illegal state search and seizure (*infra*, pp. A9, A24), we recur to our Question 3 (*supra*, p. 3)—identical with Question 2 in *Rios*, 359 U. S. 965—which, briefly stated, is whether the so-called "silver platter" doctrine (*Lustig* v. *United*

*States*, 338 U. S. 74, 78-79) is still law. Petitioners attacked that rule vigorously below, both at the trial and in the court of appeals.[15]

In *Weeks* v. *United States*, 232 U. S. 383, 398, this Court, while directing the suppression of evidence illegally seized by federal officers, approved the introduction of items similarly seized by state officers. The same distinction was repeated in *Byars* v. *United States*, 273 U. S. 28, 33, but only by way of dictum, inasmuch as the Court found federal participation in the state search and seizure that was there involved. The point was left open in *Lustig* v. *United States*, *supra*, 338 U. S. at 79, where again there was a finding of federal participation in the illegal search and seizure; and in *Benanti* v. *United States*, 355 U. S. 96, 102, note 10, it was suggested that the question was still open.

We urge that this Court reexamine so much of the *Weeks* case as approved the admission of the fruits of the unlawful state seizure. Whether *Weeks* on that point was undercut by *Wolf* v. *Colorado*, 338 U. S. 25, as Judge Hastie suggested in *Hanna* v. *United States*, 260 F. 2d 723 (D. C. Cir.), may well await plenary argument on the merits. It is sufficient now to say that in our view the state seizure aspects of *Weeks*, and indeed the "silver platter" doctrine generally, are inconsistent with the rationale of *Rea* v. *United States*, 350 U. S. 214. *Rea* held that state authorities were not free to enjoy the fruits of an illegal seizure handed them on a federal "silver platter"; why then should the federal authorities, who are subject to the Fourth Amendment as state authorities are not, be allowed greater freedom to use the fruits of an illegal seizure similarly handed them by state authorities? Our answer is that they should not be, and that

---

[15] See ¶¶ (a) and (c) of their motion to suppress (R. 47, 48); ¶ VIII(a) of their motion for a new trial (R. 114); and Specification of Error 2(2) in the Court below (Appellants' Brief, pp. 51, 55-56).

accordingly the state aspect of *Weeks* and all expressions to the same effect "can no longer be guiding" (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 143).

*Third.* Out of an abundance of caution, we have included Question 4 (*supra*, pp. 3-4), which invokes the doctrine of *Grunewald* v. *United States*, 353 U. S. 391, to the effect that a court of appeals cannot sustain a conviction on the basis of facts that were not submitted for determination to the trier of facts below.

Here the Ninth Circuit considered and rejected petitioners' contention that the Federal search and seizure were unlawful, on the ground that (*infra*, p. A10) "the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§ 3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."[16]

---

[16] Inasmuch as the court below passed on this issue, it is not necessary for petitioners to assign error as to three subsidiary points:

(a) In view of the claim made in the motion to suppress (R. 46) and repeated at the hearing on that motion (1 MS 286-287; see note 13 at p. 19, *supra*, petitioners were in fact asserting a proprietary interest in the property seized, so that the statement of the court below to the contrary (*infra*, pp. A10-A11) was plainly wrong.

(b) The court below indicated that petitioners had no standing to make the motion, because not aggrieved by the seizure (*infra*, p. A11), Elkins because his house was not originally searched, and Clark because the property was taken under the federal warrant from the Milwaukie bank. So far as the first reason is concerned, *McDonald* v. *United States*, 335 U. S. 451, 456, is square authority in petitioner Elkins' favor. Cf. *Jones* v. *United States*, 262 F. 2d 234 (D. C. Cir.), certiorari granted, 359 U. S. 988 (now No. 931, this Term).

(c) The second reason raises the question whether property in the custody of a state court may be seized pursuant to a federal search warrant; see pp. 18-19, *supra*. That question is not separately presented, since it probably will not be reached, and because in any event it is in petitioners' view a "subsidiary question fairly comprised" within their Question 1 (*supra*, p. 3) in the sense of this Court's Rule 23(1)(c).

But Rule 41(c), F. R. Crim. P. (*infra*, pp. A42-A43) prescribes that a warrant shall issue only on affidavit "establishing the grounds" for its issuance, and only after the judge or commissioner "is satisfied that grounds for the application exist or that there is probable cause to believe that they exist." Similarly, Criminal Rule 41(e) (*infra*, p. A43) provides that a motion to suppress may be based on the ground that "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued."

Those provisions on their face implement the command of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Consequently a federal search warrant issued upon an affidavit that does not establish probable cause is, necessarily, invalid. *Sgro* v. *United States*, 287 U. S. 206; *Byars* v. *United States*, 273 U. S. 28, 29. Indeed, it is a criminal offense to procure a search warrant to be issued "maliciously and without probable cause." 18 U.S.C. § 2235 (*infra*, p. A40).

Here, however, the trial judge held that the validity of the federal search warrant was immaterial, and accordingly cut off questioning on the issue of the affiant's knowledge or lack of it (2 MS 321-323, 520, quoted *supra* at p. 8, and in note 7, *supra*, pp. 8-9).

If, therefore, all of petitioners' contentions going to the invalidity of the original state search and seizure are rejected, their convictions can only be sustained on the footing that the later federal search and seizure were valid. Yet the conclusions of the court below to that effect rests on an indispensable prerequisite to such validity that petitioners were not permitted to challenge.

In *Grunewald* v. *United States*, 353 U. S. 391, this Court held that a conviction could not be sustained on appeal on a theory that was never submitted to the trier of fact at the trial. We think that doctrine extends to

the present situation, particularly since the trial judge's ruling on the motion to suppress was necessarily determinative of the outcome of the later trial. Accordingly, since he denied that motion on the view that the validity of the federal search warrant was immaterial, and hence cut off inquiry seeking to establish the insufficiency of the affidavit underlying that warrant, a contention that had been duly alleged in the motion to suppress (¶ (b), R. 47), it follows that the court of appeals erred in sustaining the federal search and seizure on an assertion which assumed the very issue that the trier of facts advisedly refused to consider.[17]

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.,
*Counsel for the Petitioner.*

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
904 Public Service Building,
Portland 4, Oregon,
*Of Counsel.*

JUNE 1959.

---

[17] The court below only recently gave effect to the *Grunewald* doctrine. See *Forman* v. *United States*, 259 F. 2d 128, 261 F. 2d 181, 264 F. 2d 955, certiorari granted, 359 U. S. 982 (No. 779, this Term).

# APPENDIX

# APPENDIX A

## Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

---

No. 15,738

April 27, 1959

---

Appeals from the United States District Court
for the District of Oregon.

---

Before MATHEWS, CHAMBERS and HAMLIN, Circuit Judges.

MATHEWS, Circuit Judge.

On February 4, 1957, in the United States District Court for the District of Oregon, appellants (James Butler Elkins and Raymond Frederick Clark), hereafter called defendants, were indicted in nine counts. On February 18, 1957, defendants were arraigned, pleaded not guilty and were granted permission "to move against the indictment" on or before March 18, 1957.[1] Defendants did not so move on or before March 18, 1957.

---

[1] See Rule 12(b)(3) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

On March 19, 1957, defendants filed a motion improperly entitled "Motion to dismiss the indictment."[2] On March 29, 1957, defendants filed a motion improperly entitled "Supplemental motion to dismiss the indictment."[3] The motion of March 19, 1957, was denied on April 2, 1957. The motion of March 29, 1957, was denied on April 12, 1957.

On March 25, 1957, defendants filed a motion improperly entitled "Motion for return of seized property and suppression of evidence."[4] That motion was denied on April 12, 1957.

On March 12, 1957, the case was set for trial on March 26, 1957. On March 18, 1957, defendants filed a motion for continuance, thereby seeking postponement of the trial to a date at least 90 days after March 26, 1957—in other words, to June 24, 1957, or later. On March 20, 1957, the District Court ordered the trial postponed to April 16, 1957, thus granting in part and denying in part the motion of March 18, 1957. On April 13, 1957, each defendant filed a motion for continuance, thereby seeking postponement of the trial to a date at least 30 days after April 16, 1957—in other words, to May 16, 1957, or later. The motions of April 13, 1957, were denied on April 15, 1957.

Defendants had a jury trial beginning on April 16, 1957, and ending on May 11, 1957. On May 9, 1957, at the

---

[2] Actually, the motion of March 19, 1957, was not a motion to dismiss the indictment, but was a motion (1) to dismiss counts 2-9 of the indictment and (2) for a bill of particulars if counts 2-9 were not dismissed.

[3] Actually, the motion of March 29, 1957, was the first and only motion of defendants to dismiss the indictment.

[4] Actually, the motion of March 25, 1957, was not a motion for return of seized property and suppression of evidence, but was a motion for an order directing that certain property be suppressed as evidence against defendants. No return of property was sought.

close of the evidence offered by the Government, defendants moved for judgments of acquittal. Thereafter, on May 9, 1957, counts 3 and 4 of the indictment were dismissed, and the motions for judgments of acquittal were denied. No evidence was offered by either defendant. However, on May 10, 1957, the motions for judgments of acquittal were renewed and again denied. Thereafter the case was argued, the jury was charged, and on May 11, 1957, a verdict was rendered finding defendants guilty on counts 1, 2 and 5-9 of the indictment.

On May 15, 1957, the time for filing a motion for a new trial and a motion in arrest of judgment was extended to May 21, 1957.[5] On May 16, 1957, defendants renewed their motions for judgments of acquittals.[6] On May 21, 1957, defendants filed a motion for a new trial and a motion in arrest of judgment. On May 24, 1957, two judgments of conviction were entered—one against Elkins and one against Clark.

The judgment against Elkins sentenced him on count 1 to be imprisoned for a period of ten months and to pay a fine of $1,000; on count 2 to be imprisoned for a period of ten months and to pay a fine of $1,000; on each of counts 5-9 to be imprisoned for a period of six months; the two periods of ten months each to run consecutively; the five periods of six months each to run concurrently with each other and with the second period of ten months. Thus Elkins was sentenced to be imprisoned for a total period of twenty months and to pay fines totaling $2,000.

The judgment against Clark sentenced him on count 1 to be imprisoned for a period of four months and to pay a fine of $250; on count 2 to be imprisoned for a period of

[5] See Rules 33 and 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

[6] See Rule 29(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

sixty days and to pay a fine of $250; on each of counts 5-9 to be imprisoned for a period of sixty days; the period of four months and the first mentioned period of sixty days to run consecutively; the five remaining periods of sixty days each to run concurrently with each other and with the first mentioned period of sixty days. Thus Clark was sentenced to be imprisoned for a total period of four months and sixty days and to pay fines totalling $500.

On June 17, 1957, the District Court entered an order denying the motions for judgments of acquittal, the motion for a new trial and the motion in arrest of judgment. On June 18, 1957, the District Court entered supplemental judgments, supplementing the judgments of May 24, 1957, by adding to and including in each of them an award of costs to the Government. These appeals are from the judgments of May 24, 1957, and the supplemental judgments of June 18, 1957.[7]

Defendants' brief contains 15 specifications of error.[8]

---

[7] Defendants obtained many extensions of the time for filing the record and docketing the appeals. Consequently, the record was not filed, nor were the appeals docketed, until May 28, 1958. Defendants' brief was not filed until October 31, 1958.

[8] Our Rule 18 (formerly Rule 20) provides:

"1. Counsel for the appellant shall file with the clerk of this court, 20 copies of a printed brief * * *

"2. This brief shall contain * * *

"(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. * * *

These will be considered in such order as may seem to us convenient.

Specification 14 says that the District Court erred "in failing to allow specification VI of defendants' motion to dismiss the indictment." The only motion of defendants to dismiss the indictment was the motion of March 29, 1957.[9] There was no "specification VI" of that motion.

Specification 14 also says that the District Court erred "in failing to allow defendants' motion in arrest of judgment," meaning, we suppose, that the District Court erred in denying the motion in arrest of judgment.

The stated ground of the motion in arrest of judgment was, in substance, that each count of the indictment failed to charge an offense against the United States. As indicated above, counts 3 and 4 of the indictment were dismissed at the close of the evidence offered by the Government. Furthermore, as indicated above, the sentences on counts 5-9 of the indictment added nothing to the sentences on counts 1 and 2. Hence, in so far as the motion in arrest of judgment related to counts 3-9, its denial—right or wrong—did not prejudice defendants. Hence we are not required to decide whether counts 3-9 charged offenses against the United States.[10] There remain for consideration counts 1 and 2.

Count 1 alleged: "That from on or about the 1st day of August, 1955, and continuously thereafter up to and in-

[9] The denial of the motion of March 29, 1957, is not specified as error.

[10] Lawn v. United States, 353 U.S. 339; Haid v. United States, 9 Cir., 157 F. 2d 631; Jaynes v. United States, 9 Cir., 224 F. 2d 367; Toliver v. United States, 9 Cir., 224 F. 2d 743; Paquet v. United States, 9 Cir., 236 F. 2d 203; Simpson v. United States, 9 Cir., 241 F. 2d 222; Chin Bick Wah v. United States, 9 Cir., 245 F. 2d 274; Donaldson v. United States, 9 Cir., 248 F. 2d 364; Robinson v. United States, 9 Cir., 262 F. 2d 647; Stein v. United States, 9 Cir., 263 F. 2d 579.

cluding the month of July, 1956, in the District of Oregon, [defendants] did unlawfully, willfully and knowingly conspire, combine, confederate and agree together and with each other and with diverse other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America, to-wit: to intercept wire communications and divulge and publish the existence, contents, substance, purport, effect and meaning of said intercepted wire communications of others, without the authority of the senders of said communications, in violation of [47 U.S.C.A. §§ 501 and 605]; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. * * *"

Count 1 further alleged that it was a part of the conspiracy that certain acts would be done by defendants. These acts were described in four paragraphs of count 1 numbered 2 to 5, inclusive. Count 1 further alleged that, to effect the object of the conspiracy, eight overt acts were done—six by Elkins, one by Clark and one by both defendants. These acts were described in eight paragraphs of count 1 numbered (1) to (8), inclusive.

Thus count 1 charged an offense against the United States, namely, a violation of 18 U.S.C.A. § 371.[11]

Count 2 alleged: "That [defendants], on or about August 23, 1955, in the District of Oregon, did knowingly,

[11] Section 371 provides:

"If two or more persons conspire * * * to commit any offense against the United States, * * * and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

willfully and unlawfully, without authority of the senders thereof, intercept and record or cause to be intercepted and recorded, wire communications between William M. Langley and Thomas E. Maloney, and divulge or cause to be divulged the existence of such intercepted communications to others, to-wit: William M. Langley, Clyde C. Crosby and others whose names are to this Grand Jury unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America." Thus count 2 charged an offense against the United States, namely, a violation of 47 U.S.C.A. §§ 501[12] and 605.

The relevant provision of § 605—the provision on which count 2 was based—is that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." As used in this provision, the term "any communication" includes intrastate communications.[13] Defendants therefore contend that this provision is unconstitutional. There is no merit in this contention.[14]

Specification 1 says that the District Court erred "in denying defendants' motion to dismiss (or in the alternative) a motion to require the Government to furnish a

---

[12] Section 501 provides: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter [47 U.S.C.A. §§ 151-609] prohibited or declared to be unlawful, * * * shall, upon conviction thereof, be punished for such offense * * * by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *"

[13] Weiss v. United States, 308 U.S. 321; United States v. Sugden, 9 Cir., 226 F. 2d 281; United States v. White, 7 Cir., 228 F. 2d 833; Massengale v. United States, 6 Cir., 240 F. 2d 781; Lipinski v. United States, 10 Cir., 251 F. 2d 53.

[14] Weiss v. United States, supra; Massengale v. United States, supra; Lipinski v. United States, supra.

bill of particulars in certain instances," meaning, we suppose, that the District Court erred in denying the motion of March 19, 1957—the motion which sought (1) dismissal of counts 2-9 of the indictment and (2) a bill of particulars if counts 2-9 were not dismissed.

The stated ground of that part of the motion of March 19, 1957, which sought dismissal of counts 2-9 was, in substance, that counts 2-9 failed to charge offenses against the United States. We have shown that count 2 charged such an offense, and that no decision is necessary as to whether counts 3-9 charged such offenses.

That part of the motion of March 19, 1957, which sought a bill of particulars was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[15] The record shows no abuse of that discretion.

Specification 2 says that the District Court erred in denying "the motion to suppress," meaning, obviously, the motion of March 25, 1957, reading as follows: "Come now [defendants], by and through their attorneys, and move [the District Court] for its order directing that certain property of which defendants herein are [on March 25, 1957] the owners, a schedule of which is annexed hereto and made a part hereof,[16] * * * be suppressed as evidence against these defendants and each of them in

---

[15] Wong Tai v. United States, 273 U.S. 77; West v. United States, 9 Cir., 12 F. 2d 776; Cummings v. United States, 9 Cir., 15 F. 2d 168; Rubio v. United States, 9 Cir., 22 F. 2d 766; Fiddelke v. United States, 9 Cir., 47 F. 2d 751; Sutton v. United States, 9 Cir., 79 F. 2d 863; Shreve v. United States, 9 Cir., 103 F. 2d 796; Maxfield v. United States, 9 Cir., 152 F. 2d 593; Himmelfarb v. United States, 9 Cir., 175 F. 2d 924; Remmer v. United States, 9 Cir., 205 F. 2d 277.

[16] The annexed schedule listed the following property: Five electronic tape recordings, one Minifon recording machine and three spools of Minifon recording wire.

this and any other criminal proceedings against them, or each of them." No other motion to suppress was made or filed in this case.

In support of the motion of March 25, 1957, an affidavit of William J. Crawford, one of defendants' attorneys, was filed by defendants on March 26, 1957. The District Court heard the motion on April 9-12, 1957. At that hearing, defendants adduced the testimony of 16 witnesses, but defendants themselves did not, nor did either of them, testify at that hearing or at all.

The stated ground of the motion of March 25, 1957, was, in substance, that the property mentioned therein was unlawfully searched for and seized by officers of the State of Oregon on May 17, 1956, and by Federal officers on September 5, 1956.

The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized at Portland, Oregon, on May 17, 1956, by officers of the State of Oregon. However, the motion did not say, nor does the record show, that any Federal officer participated in the State search and seizure—the search and seizure made on May 17, 1956. Instead, the record shows that there was no such participation. Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized.[17] Hence the question of the lawfulness of the State search and seizure need not be considered.

The record shows that the property mentioned in the motion of March 25, 1957, was searched for and seized

---

[17] Burdeau v. McDowell, 256 U.S. 465; Hall v. United States, 9 Cir., 48 F. 2d 66; Symons v. United States, 9 Cir., 178 F. 2d 615; Parker v. United States, 9 Cir., 183 F. 2d 268; Andersen v. United States, 9 Cir., 237 F. 2d 118; Rios v. United States, 9 Cir., 256 F. 2d 173.

at Milwaukie, Oregon, on September 5, 1956, by Ronald E. Sherk, an agent of the Federal Bureau of Investigation, under a search warrant issued on September 5, 1956, by Claire Mundorff, a United States commissioner within the District of Oregon, on an affidavit made and sworn to by Agent Sherk before Commissioner Mundorff on September 5, 1956. There was no other search for or seizure of the property by any Federal officer or officers.

The record shows that the Federal search and seizure—the search and seizure made on September 5, 1956—were made under, pursuant to and in conformity with 18 U.S.C.A. §§ 3102-3108 and Rule 41 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

Subdivision (e) of Rule 41 provides: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *"

As indicated above, the motion of March 25, 1957, did not seek return of the property mentioned therein, but merely sought suppression of the property as evidence against defendants; nor was the motion based on any of the five grounds specified in subdivision (e) of Rule 41.

The motion did not say, nor does the record show, that the Federal search and seizure were made at any house or place owned, occupied or used by defendants or either of them. Instead, the record shows that the Federal search and seizure were made at the First State Bank of Milwaukie, Oregon. The motion did not say, nor does the

record show, that, at the time of the Federal search and seizure—September 5, 1956—defendants or either of them owned or had any proprietary interest in the property seized,[18] or that the property was at that time in the custody or possession of defendants or either of them. Instead, the record shows that the property was not in the custody or possession of defendants or either of them at any time after May 17, 1956.

Hence, so far as the record shows, defendants were not persons aggrieved by the Federal search and seizure and had no standing to challenge the lawfulness thereof or to move the District Court to suppress the property seized.[19] Hence we are not required to consider defendants' contention that the Federal search and seizure were unlawful. However, we have considered it and find no merit in it.

Specification 3 says, in effect, that the District Court erred (1) in denying in part the motion for continuance filed on March 18, 1957, and (2) in denying the motion for continuance filed on April 13, 1957. These motions were addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[20] The record shows no abuse of that discretion.

---

[18] As indicated above, the motion contained a statement to the effect that the property seized was, on March 25, 1957, the property of defendants. That, however, was immaterial, if true; for, as indicated above, the Federal search and seizure were made on September 5, 1956.

[19] Patterson v. United States, 9 Cir., 31 F. 2d 737; Kwong How v. United States, 9 Cir., 71 F. 2d 71; Whitcombe v. United States, 3 Cir., 90 F. 2d 290; Creech v. United States, 5 Cir., 97 F. 2d 390; Wilson v. United States, 10 Cir., 218 F. 2d 755; United States v. Ponder, 4 Cir., 238 F. 2d 825; Accardo v. United States, D.C.Cir., 247 F. 2d 568; United States v. Pepe, 2 Cir., 247 F. 2d 838.

[20] Crono v. United States, 9 Cir., 59 F. 2d 339; Kramer v. United States, 9 Cir., 168 F. 2d 515; Williams v. United States, 9 Cir., 203 F. 2d 85; Hutson v. United States, 9 Cir., 238 F. 2d 167; Sherman v. United States, 9 Cir., 241 F. 2d 329.

Specification 12 and a part of specification 13 relate to the admission of evidence at the trial,[21] but do not, as required by our Rule 18,[22] quote the grounds urged at the trial for the objections to such admission and the full substance of the evidence admitted. Hence we are not required to consider specification 12 and the part of specification 13 which relates to the admission of evidence.[23] However, we have considered them and find no merit in them.

Specifications 4, 5, 6, 11 and 15 and a part of specification 13 relate to the District Court's charge to the jury, but do not, as required by our Rule 18, set out the instructions referred to[24] totidem verbis, together with the grounds of the objections urged at the trial. Hence we are not required to consider specifications 4, 5, 6, 11 and 15 and the part of specification 13 which relates to the charge.[25] However, we have considered them and find no merit in them.

---

[21] The evidence referred to in specification 12 was the testimony of eight witnesses—George Minielly, Terry D. Schrunk, Oscar D. Howlett, Howard R. Lonergan, Claude F. Cross, Vayne M. Gurdane, James C. Darby and William M. Langley. The evidence referred to in specification 13 consisted of exhibits.

[22] See footnote 8.

[23] Ziegler v. United States, 9 Cir., 174 F. 2d 439; Mosca v. United States, 9 Cir., 174 F. 2d 448; DuVerney v. United States, 9 Cir., 181 F. 2d 853; Lii v. United States, 9 Cir., 198 F. 2d 109; Cly v. United States, 9 Cir., 201 F. 2d 806; Gordon v. United States, 9 Cir., 202 F. 2d 596; Lee v. United States, 9 Cir., 238 F. 2d 341.

[24] Specifications 4, 11 and 15 refer to instructions given. Specifications 5, 6 and 13 refer to instructions refused. The instructions referred to in specifications 4, 5, 6, 11 and 13 were on the subject of interception. The instructions referred to in specification 15 submitted a form of verdict to the jury and told the jury how to use it.

[25] Ziegler v. United States, supra; Mosca v. United States, supra; DuVerney v. United States, supra; Lii v. United States, supra; Cly v. United States, supra; Gordon v. United States, supra.

Specifications 7, 8 and 9 say, in effect, that the District Court erred in denying the motions for judgments of acquittal—the motions made and denied on May 9, 1957, renewed and denied on May 10, 1957, renewed on May 16, 1957, and denied on June 17, 1957. The stated ground of these motions was, in substance, that the evidence was insufficient to sustain a conviction of either defendant on any count of the indictment. The evidence was amply sufficient to sustain a conviction of each defendant on counts 1 and 2. Since counts 3 and 4 were dismissed at the close of the evidence offered by the Government, and since the sentences on counts 5-9 added nothing to the sentences on counts 1 and 2, we are not required to decide whether the evidence was sufficient to sustain a conviction of defendants or either of them on counts 3-9 or any of them.[26]

Specification 10 says, in effect, that the District Court erred in denying the motion for a new trial. That motion was addressed to the District Court's discretion, the exercise of which, in the absence of abuse, is not reviewable.[27] The record shows no abuse of that discretion.

Judgments affirmed.

(Endorsed:) Opinion. Filed April 27, 1959.

Paul P. O'Brien, Clerk.

---

[26] See cases cited in footnote 10.

[27] Gage v. United States, 9 Cir., 167 F. 2d 122; Eagleston v. United States, 9 Cir., 172 F. 2d 194; Grover v. United States, 9 Cir., 183 F. 2d 650; Adams v. United States, 9 Cir., 191 F. 2d 206; Balestreri v. United States, 9 Cir., 224 F. 2d 915; Steiner v. United States, 9 Cir., 229 F. 2d 745; Bloch v. United States, 9 Cir., 238 F. 2d 631; Pool v. United States, 9 Cir., 260 F. 2d 57; Pitts v. United States, 9 Cir., ... F. 2d ...; Straight v. United States, 9 Cir., ... F. 2d ....

## APPENDIX B

### Judgments Below

### (1) Original Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,738

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

**Judgment**

Appeals from the United States District Court
for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: April 27, 1959
PAUL P. O'BRIEN, Clerk.

---

### (2) Judgment on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, May 28, 1959

Before MATHEWS, CHAMBERS and HAMLIN, Circuit Judges.

**Order Denying Petition for Rehearing, etc.**

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants, filed May 27, 1959, and within time allowed therefor by rule of court, for a rehearing of the above-entitled cause be, and hereby is denied.

IT IS FURTHER ORDERED that the suggestion of Appellants for a rehearing, en banc, be, and hereby is denied.

---

## APPENDIX C

**Opinion of Court Below Denying Stay to Enable the Filing of a Petition for a Writ of Prohibition**

Filed Apr 22 1957
Paul P. O'Brien, Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15522

In re Petition of JAMES BUTLER ELKING and RAYMOND FREDERICK CLARK, Petitioners, for a stay to enable the filing of a petition for Writ of Prohibition.

---

Undocketed

ORDER

---

ON MOTION TO STAY

Before STEPHENS, POPE and LEMMON, Circuit Judges.

Per Curiam.

Petitioners seek an order in effect granting a three day stay of proceedings in a criminal prosecution against them now going forward in the United States District Court of the District of Oregon, so that petitioners may have time to prepare and present here a petition for writ of prohibition to prevent the said District Court from re-

ceiving in evidence during trial of that case, certain tape recordings, and evidence concerning their import. We have heard argument on this application, and we necessarily inquire, initially, whether we may or should entertain an application for a writ of prohibition if and when such an application is presented.

The prosecution in the District Court is for violation of the federal wiretapping statute, Title 47, § 605. Prior to the federal indictment petitioners were charged with a similar offense under the laws of Oregon. Those State proceedings were instituted when a State search warrant was issued and executed, and in the process of search of petitioner Clark's residence certain tape recordings were found. Petitioners promptly moved in the appropriate Oregon court to suppress this evidence, and the motion was granted in the State court and the tapes in question were ordered delivered to the State Attorney General subject to the order of the court. They were placed by him in a bank for safe keeping.

Thereafter the F.B.I., through search warrant, procured possession of these tape recordings from the bank, and the indictment and prosecution in the federal court followed. These petitioners then went into an Oregon court and procured an injunction against the State and County officials who participated in the original procedure whereby the tape recordings were seized, restraining them from testifying or producing evidence relating to those recordings in the federal court. The injunction of the State court was issued upon that court's stated view that it was its duty thus to prevent the State agents from using the fruits of their lawful acts by which they have illegally searched the premises of a person entitled under Oregon law to protection against such searches and seizures. In this respect the action of the Oregon court resembled that ordered in Rea v. United States, 350 U.S. 214. It cited that case in its decision.

It is here alleged that notwithstanding the action of the Oregon courts mentioned, the Judge of the United States District Court, who has rejected petitioner's motion to suppress the tape recordings, is about to receive the same in evidence, and to compel the State agents to testify concerning them, and will do so unless the writ of prohibition is granted. It is conceded that an unlawful seizure by State officers, not participated in by federal officials, does not render the thing seized inadmissible in the federal courts. Feldman v. United States, 322 U.S. 487, Wolf v. Colorado, 338 U.S. 25. But we are urged to grant this relief upon some principle akin to comity between State and Nation which should require the federal courts to reject the fruits of the State officials' violation of state law.

We are aware of no authority which permits us to base an order on that principle here. The writ of prohibition is a discretionary one, which should be sparingly issued in exceptional cases only, and only when required in aid of our appellate jurisdiction. La Buy v. Howes Leather Co., 352 U.S. 249, Roche v. Evaporated Milk Association, 319 U. S. 21. The prospective witnesses who though enjoined by the State court may be subpoenaed by the federal court, are not the complaining parties here. As for the petitioners, their right of appeal from any judgment of conviction will afford them an adequate opportunity for appellate review of such rights as they may have to an exclusion of this evidence. We are not now required to express any view as to their rights in that respect. Since we are of the view that a writ of prohibition may not be issued, the application for a stay is denied.

ALBERT LEE STEPHENS
WALTER L. POPE
DAL M. LEMMON
*United States Circuit Judges*

## APPENDIX D

### U. S. District Court's Oral Opinion Denying Petitioners' Motion to Suppress

(2 MS 519-531)

THE COURT [EAST, D. J.]: Inasmuch as this matter has consumed the best part of four days, I have had that entire period of time to give my entire attention to the legal issues that are raised by the hearing and of the contentions of the parties as we were advised of them almost at the threshold of the hearing. I think that in order to advise counsel as to what my thoughts are about it, I will just take it in the order that it was presented by counsel for the defendants upon their so-called first theory that the search made by the agents of the Federal Bureau of Investigation was not itself a valid search and seizure pursuant to Rule 41, Subsection E.

Now, for the reasons that were expressed the other day, this Court does not deem it necessary to decide that issue in order to determine whether or not the articles moved against are within the legal possession of this court now. Therefore, the Court will make no finding as to whether or not the affidavit prepared by the special agent Sherk was or was not sufficient for probable cause for believing the existence on the grounds of which the warrant was issued, nor will this Court determine whether or not the warrant issued upon that affidavit was legal or illegal upon its face. Nor will this Court determine that the search and the seizure made by the special agent Sherk, as he said, in the belief that he was armed with a legal search warrant was in fact a legal exercise of search and seizure under such warrant. So, that disposes of the Court dealing with that proposition number one.

Now, with reference to the defendants' proposition two where an illegal search and seizure by State officers with

participation on the part of the Federal agency vitiates and, therefore, renders void any subsequent acquisition of the articles by that Federal agency or any of its personnel or any Federal personnel acting thereunder, our whole answer to that question is found within the interpretation of the United States Supreme Court of Lustig against the United States reported in Volume 338, United States Reports commencing at page 74. That was a five to four split decision among the nine justices of the court. The majority of the court held on various grounds, not in agreement among themselves, that under the particular facts and circumstances of that case there was such participation on the part of a Federal Officer that tainted his possession and his seizure of the property with the illegality of the search initiated by the State officials. There again there is a split of authority among the nine—of opinion among the nine justices as to the factual situation in that case.

I think it must be conceded that the majority, for reasons known to them only, stated that there was reserved a question which they did not feel that it was necessary for them to decide at that instant because they had disposed of the issue upon other grounds. And that is whether or not the doctrine originally in the so-called Byars case and then further extended in the Lustig case should even go further and render it even unnecessary—I should say, render it either unnecessary to determine whether or not the Federal authorities participated in the State illegal search and seizure because it would—the query, would not the State's illegal search and seizure of the articles in the first instance in and of itself thereafter render illegal any subsequent possession by Federal authorities?

So, in the language of Justice Frankfurter who points up that reservation by saying that he finds it unnecessary to decide whether an illegal search by the State officers bars the introduction of the fruits of the search

in a Federal court, the justice joins in that opinion they being Justice Murphy with whom Justices Douglas and Rutledge concur. But, Justice Murphy goes further and says: "But my dissenting views in Wolf vs. Colorado decided this day, make clear my position on the question he"—meaning Justice Frankfurter—"reserves." in the majority opinion. Justice Murphy with the concurrence of Justice Douglas and Rutledge say, "It is my opinion the important consideration is the presence of an illegal search. Whether State or Federal officers did the searching is no consequence to the defendant and it should make no difference to us." That, of course, is a dissenting opinion. And, as of today it is not the decision of the Supreme Court of the United States.

The present opinion of the Supreme Court of the United States is succinctly stated as follows by Mr. Justice Reed in his dissenting opinion to the holding and judgment of Lustig vs. United States wherein he says: "My understanding of the rule as to the use of evidence in a Federal criminal trial obtained by State officers through a search and seizure conducted by them under State authority is this: While it is true that the mere participation in a State search of one who is a Federal officer does not render it a Federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violation of the Constitution by circuitous and indirect methods", citing the Byars case. In the Byars opinion this court went on to say that the Federal government had the right "to avail itself of evidence improperly seized by State officers operating entirely upon their own account, but the rule is otherwise when the Federal government itself through its agents acts as such, participates in the wrongful search and seizure." This is the rule which the Court affirms today.

This District Court sitting here today cannot anticipate whether or not the Supreme Court as it is constituted to-

day or might in the future be constituted will overrule that rule, nor can this District Court sitting today anticipate that the Supreme Court as it is constituted today will accept the opinion of Mr. Justice Murphy:—and Justices Douglas and Rutledge concurring in that—"The question whether State or Federal officers did the searching is of no consequence to the defendant and it should make no difference to the court."

In other words, if the search in the first instance was illegal by State officers it is vitiated and tainted forevermore and no subsequent acquisition of the same could be acquired by the Federal government without it being violative of the defendant's rights.

So, therefore, this Court must accept the law as it is today and that law is expressed in the Lustig case by reason of the facts that are set forth in that factual circumstance.

There again the nine justices could not among themselves agree as to what the facts were or the interpretation of the facts. Perhaps it's better. The District Court and the Court of Appeals who heard the matter found from the evidence that there was no participation by the Federal officer. The majority opinion reviewed the facts de novo and disagreed with the District Court. And, the Court of Appeals upon the facts found this from the facts: After Greene had in effect scouted about, peered through the keyhole, I think, was the expression, finding no evidence of a crime he communicated his suspicion to State Officers who thereupon entered the hotel room and made the search. And, the court says: "During all this time"—I will go back a little further. "At about four o'clock in the afternoon of the same day, Koerner and three city detectives secured a key from the manager of the hotel and entered Room 402. The police officers proceeded to empty the bags and the drawers of a bureau and thus came upon the evidence sought to be suppressed. What they

found indicated counterfeiting of currency rather than of race track tickets.

"During all this time, Greene had remained at police headquarters because he 'was curious to see what they would find.' On finding what they did find, Koerner sent word to Greene, who came to the hotel and examined the evidence in controversy. When Lustig and Reynolds eventually returned they were arrested and searched by the detectives. As various articles were taken out of their pockets, those deemed to have bearing on a counterfeiting currency were turned over to Greene. He observed that the ink on a $100 bill taken from Reynolds had not been tampered with. Greene was trying to discover what had been used to make the impression on the 'similitude' found in the room. After the search was completed Greene and the city police gathered up the articles revealed by the search and carried them to the police station. Some of these articles were given to Greene before he left Room 402; all were eventually turned over to him."

Now, most rightfully, upon that construction of the facts the Court found that Greene participated in the search and seizure, not necessarily at the inception of the same, but at a time before it was completed. And, he participated up to its completion thereafter. In applying those facts with that construction the court held that the search and seizure so participated in by Greene rendered the search and the seizure violative of the defendant's right under the Fourth Amendment to the Constitution and suppressed the evidence.

Now, one further extension of the Lustig doctrine is found in one of the cases the Court cited at a prior time in these proceedings. That was upon the Court's discussion of the motions to dismiss. That is the United States against White, arising in the Seventh Circuit and being a Circuit Court of Appeals decision reported in 228 Fed. (2d), commencing at page 832. Counsel will recall that in

that case that city police officers in connection with investigating a suspected narcotics charge—at least, one of them, intercepted a telephone conversation by using an extension phone with the knowledge of one of the participants to the conversation. The court adopted the rule that under such circumstances the interception of the telephone conversation was with consent and that therefore Section 605 of Title 47 U.S.C. had no application and would not render the information received by the interception of the telephone conversation inadmissible.

Then they were confronted with the following position of the defendant:

> "Defendants also charge, but fail to argue in their brief, that a search of White was violative of his constitutional right and money taken from his person should not have been admitted as evidence. We shall consider this point. At the trial, defense counsel moved orally and unsuccessfully to suppress evidence claimed to have been obtained by the Government by means of an illegal search and seizure. The oral motion to suppress did not allege that the property seized was the property of the defendants. In Samson vs. United States, the court said that this failure in itself 'would seem to be sufficient ground for the denial of the motion',"

and cites two other circuit court cases. However, this Court makes no particular—places no particular effect on that rule.

> "Moreover, in this case the alleged illegal search and seizure were made by officers of the City of Chicago, and not by a Federal agent. Even though the evidence thus obtained was turned over to the Federal government for prosecution of the defendants, that fact does not preclude the Federal authority from using the evidence,"

citing a Fifth Circuit case Shushan vs. United States. Then it states:

> "In Lustig vs. United States the court said: 'The crux of that doctrine is that a search is a search by a Federal official if he had a hand in it; it is not a search by a Federal official if evidence secured by State authorities is turned over to the Federal authorities on a silver platter.'
>
> "In this case the alleged searches and seizures were made by city police officers, and on the following day the Federal authorities became interested in the case. Federal agent Cass testified that it was on the latter date that he first became aware of the incidents involved. There was no other evidence of Federal participation. Even if the search and seizure were unreasonable, the Government none the less was entitled to use the evidence secured, unless there was such complicity by Federal officials as to bring the seizure within the prohibition of the amendments to the Federal Constitution. Parker vs. United States,"

a Ninth Circuit case.

So, in deciding this second contention of the defendants we take up his first exception of the rule which the defendants claim that this seizure by the State officers was solely for the purpose of prosecuting a Federal case or making a Federal prosecution. Now, it is most clear from the evidence and most certainly there is no evidence in this case which this Court can find that special agent Sherk or any of the personnel of the F.B.I. office in Portland or any other agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper.

And, I recognize counsel's contention that there was some thought that the District Attorney of Multnomah

County contemplated a Federal prosecution when he wrote the letter of May 18th, the following day of the search, to the Attorney General of the State of Oregon wherein it is cited that the District Attorney believed that a Federal crime—that the articles seized were some evidence of a Federal crime.

However, there is nothing in that letter to indicate that that county official had any intention of making a Federal prosecution out of the case. He merely asked the Attorney General of the State of Oregon whether or not he would consent of this District Attorney going forward and presenting this matter to the Grand Jury.

The Court makes that as a finding of fact from the evidence produced.

Now, what was the purpose of the State officials in making this raid? I am of the official opinion, as it appears from all of the evidence in the case, that the search and seizure made by the State officials as shown by the evidence was conceived in their mind and was carried out and consummated with the sole view of obtaining evidence for a State prosecution as distinguished from a Federal prosecution.

Now, with reference to the exception two which the defendant claims changed the rule of the Lustig case—or, brings them within an exception to that apparent rule, I will put it that way—that because there was a common practice and understanding between the officials of Multnomah County and the F.B.I. officials for the District of Oregon that evidence seized by the State or, contra, by the Federal authority would be turned over to the county authorities for the purpose of the county authorities prosecution of a violation of a law under their jurisdiction.

Most certainly all of the officers who appeared have said that it was good police practice to exchange cooperative work, cooperative facilities, of one branch; that is, State

and Federal, in the help of each other in their respective spheres. Any common man would agree with that.

On the other hand, can it be said that because that is a good police practice that that is in and of itself violative of any citizen's rights under the Federal or State Constitution? Has there been a tacit understanding and an agreement and a search and seizure had in this case pursuant to a binding agreement between these individuals that evidence seized by them would not be used of any violation of a law under their jurisdiction but would be turned over to the other for prosecution solely of a violation of the law within their sphere of authority? That, of course, would be making one the agent of the other.

This record is entirely devoid of any such practice or understanding among the officers of the two spheres, State and Federal, as shown by the evidence in the case. So, for those reasons I am of the firm opinion that the defendants' motion for suppression of the articles referred to in the evidence and returning the same to them, if it be in the joint motion, should be denied in all respects.

I was hesitating and wondering whether it was necessary to make any further comment with reference to the legal position before the Court of one court interfering with the jurisdiction of the other. I think I will rely on what the record shows.

Now, you may make your record.

MR. CRAWFORD [Counsel for Petitioners]: We except to the ruling, if Your Honor please.

THE COURT: Very well.

MR. CRAWFORD: In all particulars as it is contrary to our contentions in this matter.

THE COURT: Let the record show your exception.

## APPENDIX E

### Opinion of Oregon Circuit Court Enjoining State Officers From Testifying Regarding Illegal Search and Seizure

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
*Plaintiffs,*

vs.

GEORGE MINIELLY, TERRY SCHRUNK, HAL LYNN, GARTH STACKHOUSE, RICHARD SACANTI, ARTHUR HEEM, WILLIAM M. LANGLEY, ROBERT Y. THORNTON, VAYNE GURDANE, CLAUDE CROSS, F. O. MAISON, HOWARD LONERGAN, OSCAR HOWLETT, and other State and County officials unknown to plaintiffs, *Defendants.*

MEMO OPINION

REDDING, *Circuit Judge:*

Plaintiffs in the within suit now stand indicted by a Grand Jury for Multnomah County, State of Oregon, on substantially the same charge as that on which they are now being tried in the Federal District Court for the District of Oregon. This State indictment was based on evidence obtained by a search and seizure made pursuant to a search warrant issued on May 17, 1956, by a State Judge, the Honorable John R. Mears, Judge of the District Court for Multnomah County. Plaintiffs herein on May 21, 1956, the first judicial day subsequent to said search, moved to suppress the evidence on the ground that the search warrant was improperly obtained on a faulty affidavit, in that the Honorable William M. Langley, District Attorney for Multnomah County, who applied therefor, did not have personal knowledge of the facts set

forth in his affidavit upon which Judge Mears was prevailed upon to grant said search warrant.

On May 23, 1956, Judge Mears granted defendants' (plaintiffs herein) motion to suppress the evidence obtained in said illegal search and seizure. However, prior thereto and on May 22, 1956, a Grand Jury for Multnomah County acting under the supervision and direction of the Honorable William M. Langley, District Attorney for Multnomah County, returned the indictment hereinabove referred to. Subsequent thereto, and on September 17, 1956, the Honorable Frank J. Lonergan, Presiding Judge of the Circuit Court for Multnomah County, on motion of the defendants named in said State indictment, the plaintiffs herein, again held that the search and seizure based upon the above-mentioned search warrant was illegal and directed that the evidence obtained in the search made pursuant thereto be surrendered to the Attorney General of the State of Oregon and by him held pending the further order of the Court and that any copies made of any recordings or tapes obtained in said search be destroyed.

On September 5, 1956, certain Federal officials gained possession of certain tapes and/or recordings which it is contended in the above-mentioned Federal Court proceeding were obtained by State officials on May 17, 1956, by authority of the illegal search warrant of the same date.

In February, 1957, subsequent to Judge John R. Mears' finding that the search of May 17, 1956, based upon a search warrant which he issued was illegal, as well as subsequent to Judge Lonergan's holding that said search and seizure was illegal, a Federal Grand Jury, based upon certain recordings and/or tapes allegedly obtained upon said illegal search and seizure, returned an indictment against the plaintiffs herein. The plaintiffs are now on trial in the District Court of the United States for the District of Oregon on said Federal indictment. The case against them in the Federal District Court will be made

by testimony of State officers based on information obtained by them while conducting the illegal search of May 17th. That, at least, is the basis for this suit.

The defendants, having exhausted every remedy known to them or their counsel in the Federal District Court where they unsuccessfully sought suppression of the evidence allegedly seized from the home of Plaintiff Clark on May 17, 1956, when State officers, to wit, deputy sheriffs for Multnomah County acting pursuant to invalid State process, forced the front door of said home and allegedly removed therefrom certain personal property; plaintiffs now seek in this suit relief from threatened further wrong to them by State officers who by their testimony in Federal Court are about to divulge information which said State officers wrongfully obtained pursuant to State Court process erroneously issued.

The question posed by this suit does not involve a question of whether this Court has the power or authority to interfere with the Federal Court—were this the question, the answer would be simple and would, of course, be in the negative—but rather, the question here presented for decision is—Does a State Court have the power and authority to prevent further irreparable injury to the citizens of its state growing out of the abuse of its own process? Does it have the right to correct its own wrongs where State officers, acting illegally by virtue of an abuse of the State Court's own process, violate the Constitutional rights of a resident of the State of Oregon? In other words, does a State Court of the State of Oregon, upon discovery of an abuse of the State Court's own process, have power to prevent its officers from testifying as to matters which were learned of solely and exclusively through and by virtue of such illegal State process in direct contravention of the Constitutional guarantees of the Constitution of the State of Oregon? The Attorney General of the State of Oregon—the Honorable Robert Y. Thornton—upon careful consideration states he can

see no legal obstacle to the exercise of such power. This question, it would appear to this Court, must, of necessity, be answered in the affirmative.

The general view of the Federal Courts is that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation. This proposition is supported by numerous cases, among which are the following: *Weeks* v. *United States* (1914), 232 U. S. 383; *United States* v. *Diuguid* (1945), 325 U. S. 857; *United States* v. *Pugliese* (1945), 330 U. S. 811, stating that: "It is well-settled that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account." Also see note in 50 A.L.R. 2d 531 at 573.

If I may be so bold, may I interject I find it difficult to understand or accept this Federal rule. I find far more palatable the view expressed by Mr. Justice Murphy and concurred in by Mr. Justice Douglas and Mr. Justice Rutledge in Mr. Justice Murphy's dissenting opinion in Lustig v. United States, 338 U. S. 74, where Mr. Justice Murphy says:

> "In my opinion the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us."

It is encouraging to note in recent decisions of the Supreme Court of the United States upon this subject what I discern to be an ever greater sympathy for the views expressed in the foregoing dissenting opinion by Mr. Justice Murphy as concurred in by Mr. Justice Douglas and Mr. Justice Rutledge.

*Rea* v. *United States*, 350 U. S. 214.

The corollary of the proposition that evidence obtained in an unlawful search and seizure by State officers without Federal participation is admissible in a prosecution in a Federal Court is the proposition that evidence obtained in an unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court. This view has been followed in some of the states.

Inconsistent with the theory just stated is the view taken in other State jurisdictions that evidence obtained by Federal officers by a search and seizure unlawful under Federal law must be suppressed in a prosecution in the State Courts.

To this Court it is most reassuring that the rule heretofore followed in some states that evidence obtained in an unlawful search and seizure by Federal authorities without participation of State or local officers is admissible in a prosecution in a State Court has been rendered of little practical consequences by the 1956 decision of the United States Supreme Court in *Rea* v. *United States*, 350 U. S. 214.

The well-settled Federal rule that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account completely and conclusively deprives a Federal Judge of the power or the authority to prevent the reception of evidentiary matter though improperly seized by State officers in direct contravention of State Constitutional guarantees against unlawful search and seizure. This anomaly would completely and finally deprive the plaintiffs in this proceeding from relief either in the United States District Court of the State of Oregon where they now are on trial or, indeed, from relief on appeal from an adverse verdict in said Court though based upon evidence obtained in violation of their guarantees of freedom from unlawful search and seizure given them by the Constitution of the

State of Oregon unless this Court in this proceeding is determined to have and exercises the power to restrain the defendants herein named from giving testimony with reference to information obtained by and through the illegal State Court process hereinabove referred to.

The State Court, and the State Court only, has authority to control State officers; and it is the State's function, acting by and through the Courts, to determine its policy concerning illegal search and seizure.

This Court had primary jurisdiction over the subject matter of the property—personal property situated in an Oregon residence.

This Court had actual physical custody and jurisdiction of the articles in question—one Judge had already ruled the search was illegal and ordered the items turned over to the Attorney General, an indictment in State Court based on the articles had been returned and is still pending, another motion to suppress had been filed in Circuit Court and while it was pending the property was seized by the Federal officers; Judge Lonergan subsequently reiterated the holding that the search and seizure was void and ordered the tapes held by the Attorney General subject to the order of the Court.

The order sought of this Court in this proceeding would not interfere in any way with the jurisdiction or policy of the Federal Court. It would not restrain the State officers named defendant herein from testifying or from attending Federal Court or from responding to process. It simply restricts them from testifying concerning the "fruits" of the illegal tree and, in effect, says to the Government exactly what the Government has said to the States in the Rea case: You may make your own policy as to prosecution and prosecute as you wish but we will not permit our officers to violate our law by an abuse of this Court's own process and then use the illegally obtained information to help you prosecute.

Were it not for the well-settled Federal rule hereinabove referred to that the United States may avail itself of evidence improperly seized by State officers operating entirely on their own account, I would have abiding confidence that the plaintiffs herein in their trial before the able Federal Judge before whom they are presently being tried would have no occasion for apprehension of violation of their Constitutional rights—whether guaranteed by the Constitution of the State of Oregon or of the United States. Indeed, were it within the discretionary powers of the Federal Court to exclude evidence improperly seized by State officers acting illegally in contravention of the Constitutional guarantees of the Constitution of the State of Oregon, I would be the first to acknowledge it to be presumptuous of any Court or, indeed, any person to anticipate an abuse of that discretion by the learned Federal Trial Judge. Unfortunately, under the Federal rule, a Federal District Judge is powerless to exclude evidence of State officers, though such evidence be obtained in direct violation of State Constitutional guarantees, unless such illegal seizure is participated in by the Federal authorities.

In granting the plaintiffs the relief they seek in this proceeding, I do not consider that I am showing the slightest lack of confidence in the learned Federal Trial Judge's complete devotion to the concept of human rights enshrined in the history and the basic Constitutional documents of the English-speaking peoples. Indeed, the Federal Judge before whom the plaintiffs in this proceeding are presently on trial served with distinction as a member of the Circuit Court Bench of this state for many years. I prefer to believe I am causing to be done that which the learned Federal Trial Judge would, himself, do were he not prevented from so doing by the Federal rule that evidence, though obtained by an illegal search, is nevertheless admissible in a Federal Court where the search was made for the purpose of enforcing State law by State officers without Federal participation.

I entertain the view that the admissibility or non-admissibility of the evidence in a Federal Court does not diminish one whit the inherent obligation of a State Court to correct the abuse of its process.

Reluctant though I be, I conceive it to be my duty to redress so far as it is within my power the Constitutional wrong done the plaintiffs herein through the abuse of the State Court's own process by granting the plaintiffs herein the injunctive relief which they seek in this proceeding.

*Rea* v. *United States*, 350 U. S. 214, 100 L. Ed. 233.

---

## APPENDIX F

**Operative Portions of Federal Restraining Order Forbidding Petitioners From Pursuing Contempt Proceeding in State Court Against State Officials Who Disobeyed State Order**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, *Plaintiff*,

v.

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK, *Defendants*.

No. Civ 9175

TEMPORARY RESTRAINING ORDER

THIS MATTER having come on before the above-entitled Court, based upon the verified complaint of the plaintiff herein and the motion of the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, acting pursuant to direction of The Attorney General of the United States; and the plaintiff

having moved the Court for a temporary restraining order without notice, praying that the defendants, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain Order to Show Cause entered on May 10, 1957 by the Circuit Court of the State of Oregon for Multnomah County directing that George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan show cause, on May 24, 1957 at the hour of 10:00 AM or as soon thereafter as the same might be heard, why they should not be held in contempt of said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in the United States District Court for the District of Oregon, cause No. C-18321; and it appearing to the Court that the plaintiff has alleged that:

[Par. I recited the commencement of the federal prosecution against petitioners. Par. II set forth the temporary restraining order issued by the Oregon Circuit Court (Redding, J.) in *Elkins and Clark* v. *Minielly et als.*, No. 238-958, on April 15, 1957. Par. III set forth the complaint in that case.]

IV.

That thereafter of the persons named as defendants in said action in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause at various times during the course of said trial, which trial began on April 16, 1957 and was concluded on May 11, 1957:

George Minielly, Terry Schrunk, William M. Langley, Vayne Burdane, Claude Cross, Oscar Howlett and Howard Lonergan.

That each of said witnesses was advised by the above-entitled court that said state court restraining order was as to the proceedings then before the above-entitled court of no effect and that failure to answer relevant questions put to him in said cause would subject him to being in contempt of the United States District Court for the District of Oregon.

That being so advised each of said witnesses above-named did then and there answer questions put to them by the plaintiff and defendants pursuant to said subpoenas and direction of said court.

V.

That thereafter on the 10th day of May 1957, on the Motion of defendants herein as relators, said defendants herein did obtain from said Circuit Court of the State of Oregon, Multnomah County, as relators, an Order to Show Cause, directing the said witnesses to show cause on May 24, 1957 at 10:00 A.M. or as soon thereafter as the matter may be heard, why said witnesses should not be held in contempt of said court for giving of such testimony, which Order to Show Cause was based on a Motion by the relators and supported by Affidavit of their attorney, which Motion and Affidavit are in words and figures as follows:

[Motion and Affidavit omitted.]

VI.

That the proceeding under which the defendants were charged by indictment in the United States District Court for the District of Oregon was and is exclusively a matter within the jurisdiction of the above-entitled United States

District Court pursuant to the statutes of the United States.

VII.

That the power to subpoena witnesses and compel testimony in such cases is provided by Federal law and is necessary to the exercise of the jurisdiction of the Federal Court and in aid thereof.

VIII.

That unless restrained and enjoined therefrom, the said relators, the defendants herein, will prosecute and offer evidence in said Order to Show Cause in the Circuit Court of the State of Oregon for Multnomah County, against the aforesaid witnesses, all of which will subject said witnesses to exposure to penalty as for contempt for having testified under the process of this court, with the purpose and effect of harassing and intimidating said witnesses as a result of their giving testimony in a matter in which plaintiff submits they were required to give testimony under the laws of the United States and under the Supreme law of the land.

IX.

That such action of the relators would result in the irreparable harm to the United States, its courts and litigants therein, and particularly in Case No. C-18231, United States District Court for the District of Oregon.

X.

That the interest of the United States in its power to compel testimony is by such action in danger of irreparable subversion and there can be no more fundamental subversion of the function of a court than the frustration of its power to compel testimony, and the relators, defendants herein, have sought and are seeking to subvert such power of the court by the intimidation of witnesses with

the ultimate aim of obstructing justice thereby, by preventing the production of evidence ruled by this court to be admissible under the rules of this court and the laws applicable thereto.

XI.

That plaintiff has no plain, speedy and adequate remedy at law in the premises.

XII.

That jurisdiction hereof is based on Title 28, Section 1651, United States Code.

And it further appearing to the Court that said verified complaint further alleges and prays that because said Order to Show Cause has been fixed for hearing in the Circuit Court of the State of Oregon for Multnomah County for 10:00 A.M. on May 24, 1957, unless a temporary restraining order is forthwith issued, irreparable damage may result to the plaintiff before notice can be served; and it appearing to the Court that on the allegations of the complaint, a temporary restraining order should be issued; now, therefore, it is hereby

ORDERED:

1. That the defendants herein, James Butler Elkins and Raymond Frederick Clark, and their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, be and are restrained and enjoined from giving testimony or prosecuting in any manner whatsoever in that certain proceeding in which George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan are ordered to show cause, in which the defendants, James Butler Elkins and Raymond Frederick Clark are relators and George Minielly and others are defendants, in which said cause the afore-

said witnesses are directed to appear and show cause why they should not be held in contempt of the said Circuit Court of the State of Oregon for Multnomah County as a result of giving their testimony in Case No. C-18321 in the United States District Court for the District of Oregon.

2. That this temporary restraining order shall remain in full force and effect for ten (10) days from the date hereof.

/s/ WILLIAM G. EAST
*United States District Judge*

ISSUED THIS 23rd day of May, 1957
at 10:15 o'clock A.M.

---

## APPENDIX G

### Constitutional Provisions, Statutes, and Rule of Court Involved

1. *Constitution of the United States:*

(a) Clause 2 of Article VI (the Supremacy Clause) is as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(b) The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. *Constitution of Oregon:*

Section 9 of Article I provides:

"**Section 9. Unreasonable searches or seizures.** No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

3. *Federal Statutes*

(a) Section 2235 of Title 18 provides:

"**§ 2235. Search warrant procured maliciously**

"Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1000 or imprisoned not more than one year."

(b) Section 501 of Title 47 provides:

"**§ 501. General penalty**

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

(c) Section 605 of Title 47 provides:

"§ 605. **Unauthorized publication or use of communications**

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broad-

cast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

4. *Oregon Statutes*

The provisions of the Oregon Revised Statutes (O.R.S.) here pertinent are as follows:

"141.030. **Affidavit of probable cause.** A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched."

* * * * * *

"141.090. **Penalties.** (1) Any person who maliciously and without probable cause procures a search warrant to be issued and executed is guilty of a misdemeanor. * * *"

5. *Rule of Court*

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

"**Rule 41. Search and Seizure**

* * * * * *

"**(c) Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property

specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

* * * * *

"(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."